Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1437

ALBERT ROELOFS, JR., ET AL.,

Appellees

versus

UNITED STATES,

Appellant

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI
ON BEHALF OF PETITIONERS:
FRANK LEE JACKSON, WILLIAM CARL MONTGOMERY, ET AL., MRS. ELSIE EBRED TEWELL, ET AL., MRS. DOROTHY MAE THOMAS, ARNOLD McKINNEY, NELSON PETERSON, THOMAS HOLLAND, HARRIS LEE JACKSON, B. B. DURHAM, and ALBERT ROELOFS, JR., ET UX

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7/16/74 SUPREME

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1 9 7 4

NO._____

ALBERT ROELOFS, JR., ET AL.,PETITIONERS

versus

UNITED STATES, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON BEHALF OF PETITIONERS:

FRANK LEE JACKSON
WILLIAM CARL MONTGOMERY, ET AL.
MRS. ELSIE EBRED TEWELL, ET AL
MRS. DOROTHY MAE THOMAS
ARNOLD McKINNEY
NELSON PETERSON
THOMAS HOLLAND
HARRIS LEE JACKSON
B. B. DURHAM
ALBERT ROELOFS, JR., ET UX.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on September 16, 1974; and rehearing denied on April 21, 1975.

CITATION TO OPINION BELOW

The opinion of the United States District Court for the Western District of Louisiana is reported at 344 F. Supp. 1003 [1972], a copy appears in Appendix at pp. .

The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the District Court, is reported at 501 Federal 2d 87 (September 16, 1974); a copy in appendix at pp. .

Petition for rehearing denied April 21, 1975.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered September 16, 1974; a copy thereof is appended to this petition in the Appendix at pp. .

On September 27, 1974 petitioners herein filed a request for a rehearing and a suggestion that it be en banc; and same was denied on 21 April 1975. A copy appears in the Appendix at pp. .

The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

These suits were brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 through 2680, (hereafter FTCA). The plaintiffs were employees of a government contractor and the United States asserted the defense that recovery against it in tort is barred by virtue of a provision in the Louisiana Workmen's Compensation Act limiting recovery of such employees to Workmen's Compensation benefits as

against the contractor's principal, (United States). The United States District Court held that since the United States had no obligation to pay compensation under the Louisiana Workmen's Compensation Act, (40 U.S.C. Section 290, as interpreted in Capetola v. Barclay White Co., 139 F. 2d 556 [3rd Cir 1943], Cert. Denied 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087), and was thus immune from suit thereunder, it could not avail itself of the defenses contained in that Act when sued in tort under the FTCA. The United States Court of Appeals for the Fifth Circuit reversed. The questions presented are:

1.

Louisiana Law mandates that an employer engaged in a hazardous occupation, if not liable in compensation, is liable in tort. It is a quid pro quo; a release

from one liability in exchange for another. Can the Federal and the Louisiana Laws be so read together that the United States is liable neither in compensation nor in tort?

2.

This exaction by the Army that its contractors carry compensation insurance was a matter of choice. Can the United States put itself in or outside of the FTCA by an administrative decision?

3.

There are fifteen (15) exemptions in the FTCA. Can a Circuit Court, in effect, create others contrary to the teachings in Rayonier v. U.S., 352 U.S. 315, 1 L. Ed. 2d 354, 77 S. CT. 374 (1957)?

STATUTES INVOLVED

28 U.S.C. 2674 - 2680; 40 U.S. C. 290; LSA R.S. 23:1061, 23:1101. These statutes are set forth verbatim in the Appendix at pp .

STATEMENT AND ORIGINAL JURISDICTION

(a) In a Government-owned ordnance

plant, located in Louisiana, employees of a contractor for the United States were injured or killed. Petitioners are these injured employees or their survivors. Workmen's Compensation was paid under the Louisiana Act from proceeds of a policy obtained by the contractor and required by the United States as a matter of administrative decision. The policy did not include or name the United States as an additional assured. Suit was brought by the claimants against the Government under the FTCA. The Government defended on the grounds that it was a statutory employer under the Louisiana Act and hence the FTCA was inapplicable. Petitioners filed a motion to strike the Government defense. The motion was sustained by the District Court which held in effect

that as the United States was not suable in compensation it was perforce suable in tort under the provisions of the FTCA and the Louisiana Workmen's Compensation Act. The Government sought and obtained an interlocutory appeal under 28 U.S.C. 1292 (b).

The United States Court of Appeals for the Fifth Circuit reversed the District Court in an opinion handed down on September 16, 1974. On 27 September 1974 petitioners herein sought a rehearing en banc, which was denied April 21, 1975. This action was instituted by petitioners in the United States District Court pursuant to 28 U.S.C. 1346 (b), 2671 et seq.

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with

decisions of this Court in U.S. v. Brown, 348 U.S. 109, 99 L.Ed. 139; 75 S.CT. 141 (1954) and U.S. v. Muniz, 374 U.S. 150; 10 L. Ed. 2d 805; 83 S. CT. 1850 (1963), wherein this court rejected the contention that benefits to an injured person, derived collaterally from the Government itself, are no bar to a claim under FTCA.

2.

The decision below restores to the U.S. the sovereign immunity intended to be waived by the FTCA by creating, in effect, an exemption beyong the fifteen set forth by Congress in 28 U.S.C.Section 2680.

3.

Forty-seven states have so-called statutory employer provisions similar to Louisiana, LSA R.S. 23:1061, exempt-

ing the Principal from tort under varying criteria, but analogous to Louisiana. A decision herein will doubtless have a general and important impact in the continuing task of harmonizing the FTCA with state laws.

4.

The decision below characterized this problem here as being "interesting and novel under the FTCA." This suggests the need in this area for criteria of the controlling quality only this court can give.

We therefore respectfully request that a Writ of Certiorari issue herein, together with all other necessary and appropriate orders.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Petition For Writ of Certiorari have been served on Morton Hollander, Department of Justice, Washington, D. C. 20530; Donald H. Walter, Jr., P.O. Box 33, Shreveport, Louisiana 71162 and Solicitor General United States, Washington, D. C. this 14th day of May, 1975.

Albert ROELOFS, Jr., and Vivian Roelofs
v.
LEWALS, INC., et al.,
The Travelers Insurance Company,
Intervenor.

The TRAVELERS INSURANCE COMPANY and Travelers Indemnity Company, Third-Party Defendants.

Albert ROELOFS, Jr., and Vivian Roelofs
v.
The UNITED STATES of America.

The Travelers Insurance Company,
Intervenor.

B. B. DURHAM
v.
The UNITED STATES of America.

Frank Lee JACKSON and Erma Lea Jackson
v.
HONEYWELL, INC.

William Carl MONTGOMERY, Jr., Individually, etc., et al.
v.
The UNITED STATES of America.

Mrs. Elsie E. Breda TEWELL, Individually, etc., et al.
v.
The UNITED STATES of America.

Mrs. Dorothy Mae THOMAS, Individually, etc., et al.
v.
The UNITED STATES of America and Honeywell, Inc.

Arnold McKINNEY
v.
The UNITED STATES of America.

The Travelers Insurance Company,
Intervenor.

Nelson E. PETERSON
v.
The UNITED STATES of America.

The Travelers Insurance Company,
Intervenor.

Thomas HOLLAND
v.
The UNITED STATES of America.

The Travelers Insurance Company,
Intervenor.

Harrison Lee JACKSON
v.
The UNITED STATES of America.

The Travelers Insurance Company,
Intervenor.

Civ. A. Nos. 14081, 14556, 14661, 14856, 15382, 15428, 15944, 15951-15954.

United States District Court,
W. D. Louisiana,
Shreveport Division.

May 31, 1972.

BEST COPY AVAILABLE

BENJAMIN C. DAWKINS, Jr., Chief Judge.

OPINION

The above-captioned cases are before this Court on a motion filed by the plaintiffs[1] to strike the Government's affirmative defense of non-liability under the Federal Tort Claims Act (28 U.S.C. §§ 1346, 2671 et seq.). The single question which now requires answering is: Does Louisiana Workmen's Compensation provide the exclusive remedy for plaintiffs?

Sperry Rand Corporation, pursuant to a contract with the Ammunition Procurement and Supply Agency of the United States Army, operates the Louisiana Army Ammunition Plant (LAAP), approximately 20 miles from Shreveport. Article II, Paragraph 1, of the contract (No. DA-11-173-AMC-80) authorizes the contractor to hire employees, obtain supplies, prepare and load products for shipment, and do other things required in running the plant. The United States reimburses all the corporation's allowable allocable costs plus a fixed fee. Sperry Rand is obligated, pursuant to the contract (Articles IV H(1) and S (a)) to obtain workmen's compensation insurance in accordance with Louisiana Statutory requirements. Premiums for that insurance are paid also by the Government according to the terms of the contract.

Each of the plaintiffs was an employee of Sperry Rand and was injured while allegedly in the course of his employment with that company. Prior to institution of the suits, one of the plaintiffs (Durham) filed a claim with the Department of Labor's Bureau of Employees' Compensation. The Bureau determined that Durham, and presumably, all the plaintiffs were not federal employees and, therefore, were not entitled to any benefits under the Federal Employees' Compensation Act (5 U.S.C. §§ 8101-8150).

The Government contends it is a statutory employer ("principal" or "remote," as is sometimes said) within the meaning of the Louisiana Workmen's Compensation Act (LSA-R.S. 23:1021, et seq.) which affords plaintiffs their exclusive remedy and as such is exempt from liability under the federal Act. Plaintiffs contend that the Louisiana Act is inapplicable and there is an available remedy against the United States through the Federal Tort Claims Act.

[1] Legislatures in most of the States have enacted various workmen's compensation schemes to furnish employees a speedy and equitable salary replacement, and medical expenses, during convalescence, for injuries received while in the course of employment, or for payments to dependents, including funeral expenses, of an employee who dies in a job-connected accident. By Act No. 20 of 1914, the State of Louisiana enacted the Burke-Roberts Employers' Liability Act in keeping with the current throughout the country "so that the social obligations existing between the employee and employer might be readjusted to meet the modern trend. This act, with its amendments, has come in time to be referred to as the Workmen's Compensation Act."[2] The Courts of Louisiana have given this Act a generous interpretation in order to effectuate the humane policies which it reflects. Green v. Heard Motor Co., 224 La. 1077, 71 So.2d 849 (1954); Brownfield v. Southern Amusement Company, Inc., 196 La. 73, 198 So. 656 (1940); Beard v. Wilson Wholesale Distributors, Inc., 215 So.2d 664 (La. App., 1st Cir., 1968). Federal diversity Courts under the direction of Erie Railroad v. Tompkins uniformly apply the Act liberally. Serpas v. W. Horace Williams Co., 160 F.Supp. 850 (E.D.La., 1958), aff'd 261 F.2d 857 (5th Cir.); Fontenot v. Stanolind Oil & Gas Co., 144 F.Supp. 818 (W.D.La., 1956), aff'd 243 F.2d 574 (5th Cir.).

Similarly, federal compensation systems were enacted for humane purposes. The legislation, in each instance, made limited inroads on sovereign immunity to damage claims. In United States v. Demko, 385 U.S. 149, 151, 87 S.Ct. 382, 383, 17 L.Ed.2d 258 (1966), the Court wrote:

> "Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quick and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. Johansen v. United States, 343 U.S. 427 [72 S.Ct. 849, 96 L.Ed. 1051], and Patterson v. United States, 359 U.S. 495 [79 S.Ct. 936, 3 L.Ed.2d 971], for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive."

[2] The States' workmen's compensation laws were made applicable to federal properties by Section 290, Title 40 of the United States Code.[3] The Third Circuit Court of Appeals in Capetola v. Barclay White Co., 139 F.2d 556 (3rd Cir., 1943), cert. den'd 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087, clearly placed that statute in its proper perspective.

> ("It is, of course, patent from a reading of the Act of 1936 that Congress did not thereby adopt State Compensation Acts as federal law applicable to federal territories within the exterior boundaries of the States. But it is our opinion that the purpose and effect of the congressional Act was to free State workmen's compensation laws from the restraint upon their enforcement theretofore existing by reason of the exclusive federal jurisdiction of lands within the States. . . . (At p. 559.))

See also Wallach v. Lieberman, 366 F.2d 254 (2d Cir., 1966); Stacey v. United States, 270 F.Supp. 71 (E.D.La., 1967). The obvious intent of Congress was to protect employees of Government contractors injured on federal property. Nonetheless, Section 290 did not authorize the Government to avail itself of the rights or liabilities attendant to local workmen's compensation systems.

1. All plaintiffs, except Durham, were injured in explosions which occurred at the Louisiana Army Ammunition Plant. Durham fell from an intra-plant railroad boxcar.

2. Puchner v. Employers' Liability Assurance Corporation, 198 La. 921, 5 So.2d 288, 291 (1941).

3. "Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America . . . which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

". . . *Provided, however,* That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further,* That nothing in this section shall be construed to modify or amend the United States Employees' Compensation Act, as amended."

Plaintiffs assert that we have jurisdiction over their claims under the Federal Tort Claims Act.[4] Plaintiffs object to the Government's defense on the ground that the Louisiana compensation system could make the United States liable as a statutory employer to suits by employees of private contractors. Plaintiffs contend that there is no legislative consent to be sued, unequivocally expressed, for a percentage of wages under the compensation system. Defendant suggests to the Court that it is precisely those statutes which, if read properly, require the application of Louisiana Workmen's Compensation laws and, consequently, would foreclose recovery against the Government here.

[3–7] It is axiomatic that the United States cannot be sued without its consent, and this Court has no jurisdiction in a suit against the United States to which it has not consented. United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941); United States v. Shaw, 309 U.S. 495, 60 S.Ct. 659, 84 L.Ed. 888 (1940).[5] This consent can be given only by the Congress, must be specific and explicit, and cannot be implied by construction of an ambiguous statute. A district court's jurisdiction over the United States depends entirely upon the terms of the congressional enactment which waives sovereign immunity. See Stanton v. United States, 434 F.2d 1273 (5th Cir., 1970); Gnotta v. United States, 415 F.2d 1271 (8th Cir., 1969) (Blackmun, Circuit Judge) cert. den'd 397 U.S. 934, 90 S.Ct. 941, 25 L.Ed.2d 115. Though the FTCA waives tort immunity, it was not intended as a total abolition of over a century and a half's sovereign immunity of the United States. The language of the Act indicates that it is a limited measure under which the United States has consented to be sued for certain *negligent* acts of its employees.[6] Moreover, the Act "since it is a relinquishment of a sovereign immunity, must be strictly interpreted." 312 U.S. 584, 590, 61 S.Ct. 767, 771. See also Bialowas v. United States, 443 F.2d 1047 (3rd Cir., 1971).

We think it helpful briefly to discuss the federal compensation system and, in doing so, distinguish the related cases. The Supreme Court in Johansen v. United States, 343 U.S. 427, 441, 72 S.Ct. 849, 857, 96 L.Ed. 1051, wrote: "As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect." In a foot-

4. 28 U.S.C. § 1346(b):
"(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
28 U.S.C. § 2674:
"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

5. "Probably no principle of law is better established than that the United States may not be sued without its consent." Simons v. Vinson, 394 F.2d 732, 735–736 (5th Cir., 1968), cert. den'd 393 U.S. 968, 89 S.Ct. 398, 21 L.Ed.2d 379.

6. 28 U.S.C. § 1346(b), the exceptions to which are found in 28 U.S.C. § 2680. See Vigil v. United States, 293 F.Supp. 1176 (D.Colo., 1968), aff'd 430 F.2d 1357 (10th Cir., 1970).

note to the opinion of the Court in United States v. Demko, *supra*, the Court explained: "The lower federal courts have held, uniformly, that persons for whom the Government has supplied an administrative compensation remedy are precluded from seeking recovery against the United States for injuries received in the course of their work under the Federal Tort Claims Act, the Jones Act, the Suits in Admiralty Act, or the Public Vessels Act." (At n. 4, p. 151 of 385 U.S., at p. 384 of 87 S.Ct.) The emphatic meaning of this is that where there are two systems of liability against the Government it (administrative compensation) should be the exclusive one. See Davis v. Harrod, 132 U.S.App.D.C. 345, 407 F.2d 1280 (1969); Aubrey v. United States, 103 U.S.App.D.C. 65, 254 F.2d 768 (1958).

[8] Of course, monies received by employees under Louisiana Workmen's Compensation are not paid out by virtue of a congressional act. Consequently, the possibility of recovery against the United States under the FTCA is not barred *merely* because there is an available remedy under the Louisiana Workmen's Compensation Act, even though written with an exclusivity clause.

[9] Cases in which federal employees are presented with a governmentally created mode of recovery for injury but are required to accept payments under a federal compensation scheme are distinguishable from the case at bar where employees claim alleged tortious acts committed by Government personnel and have received benefits from a non-federal source.[7]

The Louisiana workmen's compensation statute describes liability of the statutory employer,[8] and provides that the remedies under the Act constitute the employee's exclusive rights.[9]

In an article written for the Louisiana Law Review, Professor Wex S. Malone discusses the meaning of Section 23:1061 and its counterparts in different jurisdictions:

"In the absence of some special provision in the Workmen's Compensation Act it would be possible for an employer to avoid his compensation responsibility merely by interposing an independent contractor or subcontrac-

7. See Granade v. United States, 237 F.Supp. 211 (S.D.N.Y., 1965), aff'd 356 F.2d 837 (2d Cir., 1966), (18 U.S.C. § 4126 and 28 U.S.C. §§ 1346(b), 2671 et seq.); Melancon v. Morrison-Knudsen International Co., 329 F.Supp. 981 (W.D. La., 1971), aff'd Melancon v. RMK–BRJ, 449 F.2d 1280 (5th Cir.) (42 U.S.C. §§ 1701–1717, 5 U.S.C. §§ 8101–8150 incorporated by reference, 42 U.S.C. § 1701 (a)); Gradall v. United States, 329 F.2d 960, 161 Ct.Cl. 714 (1963) (Federal Tort Claims Act or the Federal Employees' Compensation Act and 5 U.S.C. § 150(k)); Rizzuto v. United States, 298 F.2d 748 (10th Cir., 1961) (FTCA and 5 U.S.C. § 150(k)); *Cf.* United States v. Muniz, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963); Daniels v. Chanute Air Force Base Exchange, 127 F.Supp. 920 (E.D.Ill., 1955).

8. LSA–R.S. 23:1061:
"Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he has contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed."

9. Section 23:1032:
"The rights and remedies herein granted to an employee or his dependent on account of a personal injury for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations."

tor between himself and his employees. This, of course, would not deprive the employee of protection so long as the intermediary contractor is solvent or protected by insurance. However, the possibility of using an impecunious middleman as a means of dodging compensation remains, and it was necessary to prevent this by subjecting certain principals to the compensation claims of their contractor's employees. A provision of this type is found in most compensation acts, and the principal who is affected thereby is commonly known as the statutory employer. Section 6 of the Louisiana Act sets forth the obligations of such a principal." 10 La.L.Rev. 25 (1949).

See also Arnold v. Shell Oil Co., 419 F.2d 43 (5th Cir., 1969); Jones v. Southern Tupelo Lumber Co., 257 La. 869, 244 So.2d 815 (1971).

[10, 11] The test for determining whether an activity is part of an employer's trade or business for purposes of the Louisiana workmen's statute is whether the particular activity is an essential or integral part of the employer's business. Arnold v. Shell Oil Co., *supra*; Thibodaux v. Sun Oil Co., 40 So.2d 761 (La.App. 1st Cir., 1949), aff'd 218 La. 453, 49 So.2d 852 (1950); Turner v. Oliphant Oil Corp., 200 So. 513 (La.App.2d Cir., 1940). For purposes of this motion, we conclude that manufacture of ammunition is essential to the United States's business of maintaining a peacekeeping defense establishment. The second prerequisite to qualification as a "principal" is proof, easily supplied here, of a contracting with another for the whole or any part of the work undertaken. Indeed, Durham concedes, for this motion, that "were the United States of America not a sovereign under the facts of this case it could qualify as a principal [or 'remote'] employer, and the work being performed would be consideerd part of its trade, business or occupation." [10] (Plaintiff's brief.) If the United States were a private individual, partnership or corporation, admittedly, it would qualify as a statutory employer within the meaning of the Act and the exclusive remedy of the employees of the contractor would be under Louisiana's Workmen's Compensation Act. Castille v. Liberty Mutual Ins. Co., 356 F.2d 509 (5th Cir., 1966); Roberie v. Sinclair Refining Co., 252 So.2d 488 (La.App. 3rd Cir., 1971). Recovery against the United States would be excluded if it were such a private entity; but, since it is not, there must be congressional action evidencing an intent to avail the Government of local compensation systems.

[12, 13] The Federal Torts Claims Act is a statutory waiver of immunity which provides a judicial remedy for tort claims against the Government. In Wiltse v. United States, 74 F.Supp. 786, 787 (W.D.La., 1947), the Court wrote:

> "This statute does not create a cause of action, but waives *pro tanto* the sovereignty of the United States to permit suits for torts committed by agents and employees of the Government acting within the scope of their authority, or employment, to the same extent, and for the same reasons, which, under the State law, can be asserted against private persons, subject to the limitations above quoted."

See also Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). Section 1346(b) of the Act provides that the United States shall be liable for the negligent or wrongful acts of its employees "under circumstances where the United States, if a private person, would be liable to the claimant", and Section 2674 states that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." Obviously, actions *ex delicto* brought against the Government are maintainable only if the law of the locale under like circumstances would permit recovery. Despite the close connection between tort actions and actions under Workmen's Compensation, the FTCA refers to torts (a common law concept and remedy) and not to workmen's compensation, which is, of course, a statutory remedy.

We turn to the rather sparse jurisprudence to determine whether the FTCA has been interpreted to incorporate local compensation statutes. (The Third Circuit in Capetola v. Barclay White Company, *supra*, concluded that 40 U.S.C. § 290 permitted local State workmen's compensation laws to have effect only between private contractor-employer and employee.) Federal Courts in Louisiana, Idaho, and South Carolina have discussed the relationship between State workmen's compensation statutes and the Federal Tort Claims Act.

In Stacey v. United States, 270 F. Supp. 71 (E.D.La., 1967), Judge Christenberry wrote:

> "The United States cannot be held liable to plaintiff or any third-party complainant or cross-claimant since it was the statutory employer of plaintiff. Sanderson v. Binnings Construction Company [172 So.2d 721 (La.App. 4th Cir. 1965)] and other cases cited above." (At p. 75.)

There, the plaintiff, an iron worker, brought suit against the United States, alleging jurisdiction under the Federal Tort Claims Act, on the theory that the United States was the owner of the premises at the Michoud facility, New Orleans. Welding and Manufacturing Company (W & M) contracted with the United States to undertake the job of modification of the roof tresses at the plant. Mason-Rust, a joint venturer, entered into a contract with the United States as a support service contractor. By virtue of the latter contract, Mason-Rust had the obligation and duty to supervise safety in the Michoud plant, and the Court found that it had failed and neglected to perform its duty in connection with safety supervision. The Court specifically found that "there has been no showing of any breach of duty or negligence on th part of any employee, agent or servant of the United States of America." (At p. 73.) Judge Christenberry concluded that NASA was a congressionally created civilian agency which was charged with control of aeronautical and space activities of the United States. By virtue of the acts of Congress, it was established as a matter of law that the work which was being carried on by W & M on behalf of the United States through NASA was part of the regular business activities of NASA and was within the function or "usual trade, business or occupation" of NASA within the meaning of the Louisiana Workmen's Compensation sections. The Court decided that the Louisiana Workmen's Compensation statute was applicable to federal properties, citing 40 U.S.C. § 290, and that

> "[t]he United States of America, through the National Aeronautics and Space Administration (NASA) is, under the Louisiana Workmen's Compensation Act (RS 23:1061), a statutory employer of plaintiff, and like a private individual under like circumstances the United States would be a principal under the Louisiana Workmen's Compensation Act, and protected in the same manner and to the same extent as an employer, by the exclusive benefits provided therein." (Citations omitted.) (At p. 75.)

[14] References to Louisiana Workmen's Compensation and the United States as a statutory employer of plaintiff are mere dictum in light of the specific finding in that case that the Government was not negligent. Suit under the FTCA will result in liability on behalf of the Government only where plaintiffs can prove negligence. The conclusion that the United States benefited under the exclusivity provisions of the Louisiana Workmen's Compensation statute was unnecessary to decision and as such is of slight precedential value. We hesitate to consider it even persuasive since there was no discussion of the gravamen of the objection to application of Louisiana's Workmen's Compensation Act made by plaintiffs in the case *sub judice*.

10. Of course, the plea of "statutory or remote employer" is an affirmative plea and the burden of proving by a preponderance of the evidence would have to be discharged by the Government. James v. Lykes Bros. S. S. Co., 175 So.2d 444 (La. App. 4th Cir., 1965).

In Kirk v. United States, 124 F.Supp. 233 (D.Idaho, S.D., 1954), representatives of the deceased employee brought a tort action against the United States alleging that it was through the Government's employees' carelessness and negligent failure to perform their duties that William M. Kirk died. Plaintiffs there alleged that the Army Corps of Engineers was engaged in the construction of a dam on the Boise River, as authorized by statute and regulation of the United States of America and the Department of the Army. Kirk was employed as a carpenter by Bruce Construction Company which had contracted with the Government to do work on the project. Plaintiffs admitted receiving a substantial sum under the Idaho Workmen's Compensation Act, but commenced the suit in federal court relying on 28 U.S.C. § 2674. The Idaho Workmen's Compensation law fashioned this statutory remedy as the exclusive remedy of employees against their employers and further provided that:

> "An employer subject to the provisions of this act, shall be liable for compensation to an employee of a contractor or subcontractor under him or who has not complied with the provisions of section 72-801 in any case where such employer would have been liable for compensation if such employee had been working directly for such employer. The contractor or subcontractor shall also be liable for such compensation, but the employee shall not recover compensation for the same injury from more than one party." Section 72-811, I.C. (At. p. 235.)

The Court noted that the contractors were performing work for the United States and did comply with the Workmen's Compensation laws of the State of Idaho by obtaining that protection for their employees. Without extensive analysis, the Court unhesitatingly concluded:

> "Under the allegations of plaintiffs' complaint the contractors for whom the decedent was working at the time of his death were the agents of the defendant and the defendant maintained supervision and control of the construction. Under such circumstances the United States was the employer as defined by the Workmen's Compensation Laws of Idaho. Under and by virtue of the Federal Tort Claims Act the United States has consented to be sued for torts committed by it *in the same manner and to the same extent as a private individual under like circumstances*. The United States having submitted to suit as if a private person, its liability and defenses under local law must be considered in terms of the application of said local law to a private individual. It must be conceded that under the circumstances of this case a private individual would not be liable to the plaintiffs due to the provisions of Section 72-203, I.C." (At p. 236.) (Emphasis in original.)

The Ninth Circuit, in reversing the District Court's ruling,[11] did not question the applicability of Idaho's Workmen's Compensation Law, Idaho Code, Sections 72-101, 72-1103, to the facts. The higher Court merely disagreed with the District Court's decision that the United States was an "employer" within the meaning of the statute in relation to the work that was under way.[12] Therefore the Court reversed and remanded for determination of whether or not there was negligence on the part of the United States. The case appeared again in the Circuit Court[13] and, as before, there was no questioning of Idaho Workmen's Compensation statute's applicability to the facts. The Court concluded that there was no duty on behalf of the United States and therefore a negligence cause of action could not be maintained.[14]

[15] Doubtless the Ninth Circuit has concluded that local compensation systems can protect the United States from liability in circumstances where the Government qualifies as a statutory employer and compensation system is made the exclusive remedy of the employee. Nevertheless, their opinions shed no light on the intermediary steps they took in deciding the statute was applicable or whether the present problem was discussed.

In United States v. Seckinger, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), reh'g den'd 397 U.S. 1031, 90 S.Ct. 1255, 25 L.Ed.2d 546, the Court reversed an appellate decision[15] which held that a provision common to fixed-price Government construction contracts could not be interpreted to allow the Government to recover from the contractor damages suffered by the Government on account of its own negligence. The Government had entered into a contract with defendant for performance of certain plumbing work at a Marine base in South Carolina. One of the private contractor's employees, Branham, was seriously injured when he came in contact with an electric wire that carried 2400 volts of electricity. The Supreme Court noted that the injured employee had recovered benefits under South Carolina's Workmen's Compensation Law, S.C.Code Ann. §§ 72-1 to 72-504 (1962), and then commenced a suit in the Eastern District of South Carolina against the United States under the Federal Tort Claims Act, on the theory that his injuries had been sustained as the result of the Government's negligence. The South Carolina District Court held that the Government had been grossly negligent in failing to de-energize the wire in this particular case and awarded Branham $45,000 in an unreported decision by Judge Timmerman. No appeal was taken from the judgment of the District Court, so its holding was not subject to review by the United States Supreme Court. The decree in the unreported case, Branham v. The United States of America, (E.D.S.Car., Columbia Div., June 23, 1961) makes no reference to Branham's earlier recovery of an award under workmen's compensation. The South Carolina Workmen's Compensation law protects an employee who is engaged in an employment under any contract of hire when he is injured in the course of the trade, business, profession or occupation of his employer. Section 72-11. Section 72-111 describes the liability of an owner to workmen of a subcontractor in language strikingly similar to that found in Louisiana Workmen's Compensation statutes:

> "When any person, in this section and §§ 72-113 and 72-114 referred to as 'owner,' undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 72-113 to 72-116 referred to as 'subcontractor') for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay

11. 232 F.2d 763 (9th Cir., 1956).

12. "Perhaps the most numerous types of persons in the State of Idaho likely to be constructing dams would be farmers or groups of farmers building dams and other irrigation works to provide the artificial application of water to arid lands. Such enterprises come within the definition of 'agricultural pursuits', also exempt under § 72-105a . . . . . If such a farmer, exempt under the Act, were guilty of negligence while his dam was under construction by an independent contractor, and if that negligence caused death or injuries to the contractor's employee, an action would lie against the farmer. So in the case of the supposititous private corporation, such perhaps as a church, operating not for the sake of pecuniary gain, exempt under subdivision 8, *supra*. Both of these are instances presenting *like* circumstances within the meaning of Title 28 § 2674. Both supply an answer to the important inquiry as to whether there is an 'analogous liability' in the law of torts. There is." (At p. 768.)

13. 270 F.2d 110 (9th Cir., 1959).

14. More recently the Ninth Circuit in Ray v. Monsanto Co., 420 F.2d 915 (9th Cir., 1970), cited the first *Kirk* decision with approval, without discussing the underlying theme that access to the Federal Tort Claims Act could be barred by Idaho Workmen's Compensation laws relating to statutory employers and exclusiveness.

15. 408 F.2d 148 (5th Cir., 1969). The Supreme Court held that the Government was entitled to indemnity on a comparative basis to the extent that the employer's negligence contributed to the employee's injuries.

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to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him." [16]

The purpose of this section is the same as found in Louisiana Workmen's Compensation statute as discussed by Professor Malone. See Blue Ridge Rural Electric Cooperative, Inc., v. Byrd, 238 F.2d 346 (4th Cir., 1956), reversed on other grounds 356 U.S. 525, 78 S.Ct. 893, 21 L.Ed.2d 953 (1958); Adams v. Davidson-Paxon Co., 230 S.C. 532, 96 S.E. 2d 566 (1957). Section 72-121 [17] specifically excludes all rights and remedies of an employee against his employer except as provided in the Workmen's Compensation Act. Adams v. Davidson-Paxon Co., *supra*; Gainey v. Coker's Pedigreed Seed Co., 227 S.C. 200, 87 S.E.2d 486 (1955). Despite a South Carolina compensation system which exclusively restricts employees of private contractors to a statutory remedy, the Federal District Court sitting in South Carolina permitted an injured employee to bring suit against the United States; after trial the Court determined that the Government was grossly negligent and should pay plaintiff a substantial amount without reference to the sum he had recovered through workmen's compensation.

[16] Consequently, we are unable to discern an unqualified line of jurisprudence compelling us to a single conclusion; we know of none, nor have we been cited to any decisions of the Fifth Circuit which would be controlling in this area. Our decision rests, therefore, on an interpretation of the Federal Tort Claims Act, mindful that "[i]t is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress." United States v. Shaw, 309 U.S. at 502, 60 S.Ct. at 662; see also Gardner v. United States, 446 F.2d 1195 (2d Cir., 1971).

[17] We hold that Congress in passing the FTCA referred only to the common law tort cause of action. Were we to permit the Louisiana Workmen's Compensation Statute to be incorporated into the Federal Tort Claims Act, it would drive a greater breach into the doctrine of sovereign immunity than the Congress intended. We are cognizant of the fact that the United States pays workmen's compensation premiums according to its contract to protect Sperry Rand Corporation. Nevertheless, only tort immunity has been waived and that only in a strictly interpreted manner. Application of the Louisiana Workmen's Compensation statute to this situation would permit an employee of a private contractor, theoretically, to sue the Government for an award according to the Louisiana system's wage levels. Nowhere in congressional legislation, nor conclusively in the jurisprudence, is there the specificity required for authorization to extend our jurisdiction to entertain that cause of action.

[18] A local compensation system which permits recovery against a statutory employer cannot be used to seek workmen's compensation relief from the Government, nor may the Government avail itself of the exclusive benefits thereunder, unless there has been consent by an unambiguous statute passed by the Congress.

It is ordered that the motion to strike the defense asserted here is granted.[18]

16. The term "owner" is synonymous with the principal contractor. Marchbanks v. Duke Power Co., 190 S.C. 336, 2 S.E.2d 825 (1939).

17. "The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death."

18. The view we taken obviates discussion of plaintiffs' further objections to the United States' defense.

Albert ROELOFS, Jr., et al., Plaintiffs-Appellees,

v.

UNITED STATES of America et al., Defendant-Appellant,
The Travelers Insurance Company, Intervenor.

No. 72-3475.

United States Court of Appeals,
Fifth Circuit.

Sept. 16, 1974.

JOHN R. BROWN, Chief Judge:

This interlocutory appeal raises an interesting and novel problem under the Federal Tort Claims Act.[1] The question is whether the Government may invoke a defense available to private employers under the Louisiana Workmen's Compensation Statute despite the fact that the United States, due to its preeminent sovereign immunity, could not be compelled to comply with the obligations of a private employer under the statute. The District Judge held that to permit the Government to raise the defense envisioned by the statute was the equivalent of the Government subjecting itself to suit under a local compensation system—an unauthorized waiver of sovereign immunity not contemplated by Congress. He rejected the defense. Disagreeing with these conclusions, we reverse.

To bring the problem closer to earth it is one of harmonizing the FTCA and the Louisiana Compensation Act. Under FTCA the tort liability of the Government is extended to tort claims for negligent damage to person or property "under circumstances where the United States, if a private person, would be liable . . . in accordance with the law . . ." of the place of the tort.[2] Tied as it is to liability of a private

1. 28 U.S.C.A. § 1346.

2. 28 U.S.C.A. § 1346 provides:
United States as defendant

• • • • • • • • • •

(b) • • • the district courts • • • shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, • • • for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

• • • • • • • • • •

In addition the liability of the United States is set out in 28 U.S.C.A. § 2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but

actor under local law, the case brings in famed § 6 of the Louisiana Compensation Act.

§ 6[3] imposes on the party for whom work is being done by a contractor (or subcontractor) the obligation of paying workmen's compensation to an injured employee of such contractor/subcontractor. The key is whether in the work at hand the contractor/subcontractor is doing work ". . . which is a part of [the] trade, business, or occupation" of the party for whom the contracted work is being performed.

But while Louisiana, so its courts have many times said, adopted this device as a means of subverting the payment of compensation through the device of impecunious contractors[4],

shall not be liable for interest prior to judgment or for punitive damages.

• • • • • • • • • •

3. La.Rev.Stat. 23:1061 that provides:
Principal contractors; liability
Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

4. See the oft-cited and many times court-approved comment by Professor Malone

"All the provisions of Section Six make clear the fact that the sole purpose of this section is to prevent the evasion of compensation . . . .. As between the principal and the contractor, it is fair that the latter, as the employer of the claimant, should bear

its significance here is not in an asserted right by the claimants to recover Louisiana Compensation payments from the Government. Indeed, that is the last thing wished, hoped or prayed for. Rather it is that under Louisiana jurisprudence § 6 in imposing a vicarious liability for compensation payments clothes that party with the status of a "principal" or more descriptively, a "statutory employer," so that it will not constitute a suable "third person" under the provisions of the Act permitting suit by an employer (or his carrier) or an employee where the injury/death has been caused by the negligence of another.[5]

> the risk of accident. For this reason, the principal who is made liable under Section Six is entitled to indemnity and he can interplead the contractor and demand judgment over against him. The net effect is that the principal merely lends his solvency to the worker's claim, and he can effectively protect himself in advance either by satisfying himself that the contractor is solvent or by insisting that the latter insure against work accidents." Malone, Principals Liability for Workmen's Compensation to Employers of Contractors, 10 La.L.Rev. 25 (1949).
>
> We struggle with this problem in countless diversity and amphibious-ambiguous maritime situations, generally about whether the operational activity is, or is not, "part of [the] trade, business, or occupation." See one of our leading cases: Arnold v. Shell Oil Co., 5 Cir., 1970, 419 F.2d 43 and others, *e. g.* Gorsalitz v. Olin Mathieson Chemical Corp., 5 Cir., 1970, 429 F.2d 1033, 1040–1042.

5. La.Rev.Stat. 23:1101

> § 1101. *Employee and employer suits against third persons causing injury; effect on right to compensation*
>
> When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third person) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, nor be regarded as establishing a measure of damages for the injury; and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury.
>
> Any employer having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to any injured employee or his dependent.

This immunity to third party suit, presumably the creature of judicial interpretation of § 6,[6] has survived the direct assault of the organized Louisiana plaintiffs bar[7] and stands as a lion in the street unless on minute facts the case is outside the "usual, trade, or business."

[1] The significance of all of this here is that since the Government neither had nor was subject to an enforceable obligation to procure Louisiana compensation insurance,[8] for it

6. The Government brief informs us that 44 states now have statutory employer provisions in their workmen's compensation statutes (2 Larson's Workmen's Compensation, § 72.31, p. 189 (1970 ed.). Except possibly for Kirk v. United States, D.Idaho, 1954, 124 F.Supp. 233, rev'd, 9 Cir. 1956, 232 F.2d 763, no case out of Louisiana has been cited showing that other jurisdictions read the third party immunity into their statutory employer provision.

7. Broussard v. Heebe's Bakery, Inc., 1972, 263 La. 561, 268 So.2d 656, 658 and see Tate, J. concurring at 661.
This Court has commented on this problem before *e. g.*, Huson v. Otis Engineering Corp., 5 Cir., 1970, 430 F.2d 27, (See fn. 9) affirmed in part, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. See also, Nations v. Morris, 5 Cir., 1973, 483 F.2d 577.

8. Certainly nothing in 40 U.S.C.A. § 290 imposes such an obligation:

> *State workmen's compensation laws; extension to buildings and works of United States*
>
> Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.
>
> For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however,* That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the

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to have the Louisiana judge-made § 6 third party immunity would be, the claimants successfully urged below, to afford it the benefits with none of the burdens. Stated another way, their contention is that the § 6 immunity extends only to principals who are legally required to pay compensation. If that legal obligation is missing, so is § 6 immunity.

The District Court agreed with this thesis. But as the claimants could not ever recover if this holding was reversed even if they jumped the § 6 "usual trade business or occupation" hurdle,[9] the District Court certified this appeal, 28 U.S.C.A. § 1252 which we allowed.

> exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further*, That nothing in this section shall be construed to modify or amend the United States Employees' Compensation Act, as amended.
> June 25, 1936, c. 822, §§ 1, 2, 49 Stat. 1938, 1939.
> For its genesis and development see:
> Murray v. Joe Gerrick & Company, 1934, 291 U.S. 315, 54 S.Ct. 432, 78 L.Ed. 821, 92 A.L.R. 1259, 1263; James Stewart & Company v. Sadrakula, 1939, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, 601; Travelers Insurance Co. v. Cardillo, 1944, 78 U.S.App.D.C. 392, 141 F.2d 362; Capetola v. Barclay White Company, 3 Cir., 1943, 139 F.2d 556, 153 A.L.R. 1046, cert. den. 321 U.S. 799, 64 S.Ct. 939, 88 L.Ed. 1087:
>
> "It is, of course, patent from a reading of the Act of 1936 that Congress did not thereby adopt State Compensation Acts as federal law applicable to federal territories within the exterior boundaries of the States. But it is our opinion that the purpose and effect of the congressional Act was to free State workmen's compensation laws from the restraint upon their enforcement theretofore existing by reason of the exclusive federal jurisdiction of lands within the States and that, forthwith upon the federal enactment, Pennsylvania's Workmen's Compensation Act became operable as to injuries received by employees of private employers on federal property within the State's exterior boundaries. The situation created by the Act of 1936 was no different, so far as the operation of Pennsylvania's compensation law is concerned, than it would have been had Pennsylvania never ceded jurisdiction of the Navy Yard site to the federal government."

9. The plaintiffs have been very careful to reserve the question of whether the activity that Sperry Rand performs for the Government meets the criteria of "trade, business, or occupation" necessary to qualify the Government as a principal under § 6. Therefore, we assume for the purpose of this appeal that the manufacture of munitions is a traditional government function.

   Without intimating pre-judgment, the assumption is probably a safe one since nations make wars and wars mean munitions the supply of which has from year to year and war to war come from Government-operated and cost-plus contractors of Government-owned facilities. See, Powell v. United States Cartridge Co., 1949, 339 U.S. 497 at 499, 70 S.Ct. 755, at 757, 94 L.Ed. 1017 (See especially fn. 2 at 1028).

In the resolution of the basic § 6 problem, the facts can be quickly capsulated. These are eleven FTCA suits by contractor-employees for injuries[10] sustained from the operation of the Louisiana Army Ammunition plant near Minden, Louisiana. The plant is a government-owned facility privately operated by Sperry Rand Corporation pursuant to a contract with the Ammunition Procurement And Supply Agency of the United States Army (No. DA–11–173–AMC–80). Under the contract Sperry Rand hires the employees, prepares and loads the products for shipping, and generally does all jobs necessary to operate the plant. The cost-plus-fixed-fee contract obligates Sperry Rand to maintain workmen's compensation for the plant employees and the premiums for that insurance are reimbursed by the government as a regular contract expense.[11] Such coverage was obtained and in effect at the time of the accident that resulted in these suits.

[2, 3] If we approach this with literalism the Government cannot prevail. This is so because Louisiana cannot impose on it a legal obligation either to procure compensation insurance or to pay compensation benefits. (See note 8 *supra*). But this is not the history of FTCA or its generous development by the Supreme Court. That Act is given a broad interpretation to effectuate the legislative aim of putting citizen and national sovereign in tort claims suits on a footing of equality as

10. Ten grew out of two separate violent explosions on loading lines, the eleventh from a fall from a railroad car.

11. The United States was not, however, included as a named or omnibus insured on the Louisiana workmen's compensation policy.

between private parties within that state.[12] Nice pieces of casuistry and hypersensitive legalisms are avoided.

Thus, in *Indian Towing*[13] the Court considered the Government argument that "the language of § 2674 (and the implications of § 2680) imposing liability 'in the same manner and to the same extent as a private individual under like circumstances . . . .' must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of uniquely government functions." Declaring that "we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence of identical private activity . . . [and there] is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being

12. For some of the express Congressional limitations in the FTCA, see Richards v. United States, 1961, 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492.

The Act permits claimants to sue only in the federal courts, and not in the state courts which are available in actions against a private individual, § 1346(b); the Act prescribes its own period of limitations which may be shorter or longer than that of the State, § 2401(b); the claimant cannot obtain a trial by jury under the Act, although he could against a private individual, § 2402; the claimant cannot obtain interest prior to judgment in suits under the Act regardless of the state rule governing private individuals, § 2674; the claimant cannot obtain punitive damages under the Act, even though state law may provide for it as against a private defendant, § 2674; the claimant cannot recover any damages against the United States on any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, whereas he could recover such damages against a private individual, § 2680(h); the claimant cannot obtain any recovery against the United States on a claim arising in a foreign country, although he could against a private individual, § 2680(k); and the Act exempts the Government from liability for claims based on various types of activities, although a private individual would be liable in the same circumstances, § 2680.

13. Indian Towing Co. v. United States, 1955, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48.

held in the mind for adequate formulation." The Court held that the "language of the statute does not support the Government's argument." The Court rejected literalism and read the private person liability of § 1346 (see note 2 *supra*) as being "designed to . . . compensate the victims of negligence in the conduct of governmental activities in circumstances *like unto* those in which a private person would be liable . . . ."[14]

Next, the Court in *Rayonier*,[15] limiting sharply some of its pronouncements in the Texas City Disaster Case,[16] held that the Government would be liable under vicarious Washington laws for fire fighting derelictions even though there was not like private activity and all usual activity—that of municipalities—would be subject to no liability.

We have done similarly in *Gavagan*[17] where, against a similar Governmental assertion that there was no like private activity, we held the Government accountable under FTCA for a land-air-sea rescue search.

Of course, we are not dealing here with interpretations on *coverage* of FTCA. Rather, it is on defenses. But we see no reason why in this liability by local standards criteria a like and sensible approach is not given to local defenses.

[4] This takes us to the Louisiana aim of § 6 to assure compensation benefits to employees of contractors doing work for others. At bottom, claimants argue that the essence of the statute was to insure the employee "two debtors not one." But one thing that is not intended is double payment of compensation, once by the "actual" employer and once by the "statutory" employer. Indeed, while pursuit can in the Loui-

14. From 350 U.S. 61, 68-70, 76 S.Ct. 122, 100 L.Ed. 48.

15. Rayonier, Inc. v. United States, 1957, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354.

16. Dalehite v. United States, 1952, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427; *see also*, Smith v. United States, 5 Cir., 1967, 375 F.2d 243, cert. den., 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106.

17. United States v. Gavagan, 5 Cir., 1960, 280 F.2d 319.

siana codal language be *in solido,* which is to say against (i) actual employer, (ii) statutory employer or (iii) both, only a single recovery is permitted.[18]

[5] Of course this objective is accomplished through the unquestioned requirement that Sperry Rand, the contractor, maintain at the Government's expense workmen's compensation. Not only was it done in fact, but presumably it was done in accordance with established policies [19] which have the effect of not only relinquishing any claim to Federal territorial sovereignty over lands of the Federal enclave, but carrying out the substantive policies of § 290 (see note 8 *supra*) to assure privately-employed workers on Federal projects equal treatment with other industrial laborers in the state. Thus the goals of Louisiana and the United States are mutually met. The workers have the protection in fact [20] that they would have if, in addition to Sperry Rand's insurer, they would have the direct obligation of the Government. On the other hand, with this assured in fact,[20] the Government, having seen to it that compensation by the contractor is afforded

18. Jones v. Southern Tupelo Lumber Company, 257 La. 869, 244 So.2d 815 (1971):

> "The courts below correctly cast all of the defendants solidarily, for when an employee is entitled to compensation and under R.S. 23:1061 or R.S. 23:1063 has sued the principal or the principal contractor together with the contractor or subcontractor, the liability of such defendants is solidary. * * * Under these statutes the claimant is entitled to proceed against the principal (or principal contractor) or the contractor (or subcontractor) or both as he chooses. The indemnification clauses, however, have the effect of finally imposing the loss of the principal or principal contractor upon the claimant's immediate employer." *Id.* 244 So.2d 815.

See also Seabury v. Arkansas Nat. Gas Corp., 14 La.App. 153, 127 So. 25 [1930]; Calcote v. Century Indem. Co., 93 So.2d 271 [La.App. 3rd Cir., 1957]; Meche v. Farmers Drier & Storage, 193 So.2d 807 [La.App. 3rd Cir., 1967].

19. *See,* 41 C.F.R. 1-10. 502-1, which prescribes that compliance with applicable workmen's compensation and occupational disease statutes will be required.

20. Louisiana compensation benefits have been paid or are payable to each of the eleven claimants (or their successors).

at the Government's expense, is, as would be a private Louisiana statutory employer, entitled to the § 6 immunity.

The key finally is the existence of adequate insurance required and paid for by the Government. Whether the result would be the same if the Government contract did not require maintenance of compensation insurance is a matter for another day.

Reversed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk -
600 Camp Street
New Orleans, La.
70130

April 21, 1975

TO ALL COUNSEL OF RECORD
Re: 72-3475 - Albert Roelofs, Jr., Et Al. vs. U.S.A., Et Al.; Travelers Insurance Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition(s) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

BY Barbara Krei
Deputy Clerk

cc: Messrs. Donald E. Walter
D. H. Perkins, Jr.
Mr. Wilton H. Williams, Jr.
Messrs. Morton Hollander
James C. Hair
Michael Kimmel
Mr. Kenneth Rigby
Mr. Jack C. Benjamin
Mr. L. L. Lockard
Mr. James J. Thornton
Mr. Nesib Nader
Mr. Donald R. Miller
Mr. Paul R. Mayer
Mr. Lewis Weinstein
Mr. Hugh M. Stephens

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

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§ 1346. United States as defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the

United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution,or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges,

Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, [together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands,] shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, [accruing on and after January 1, 1945,] for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or

employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have

exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

As amended Aug. 30, 1964, Pub.L. 88-519, 78 Stat. 699; Nov. 2, 1966, Pub.L. 89-719, Title II, §202(a), 80 Stat. 1148; July 23, 1970, Pub.L.91-350, § 1(a), 84 Stat. 449; Oct. 25, 1972, Pub.L. 92-562, §1, 86 Stat. 1176.

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§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of

appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

June 25, 1948, c, 646, 62 Stat. 928.

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§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741–752, 781–790 of Title 46, relating to claims or suits in admiralty against the United States.

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(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1–31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

[See main volume for text of (a) to (g)]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

[See main volume for text of (i) to (n)]

As amended Mar. 16, 1974, Pub.L. 93–253, § 2, 88 Stat. 50.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(*l*) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

June 25, 1948, c. 646, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a) (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86–168, Title II, § 202(b), 73 Stat. 389.

§ 290. State workmen's compensation laws; extension to buildings and works of United States

Whatsoever constituted authority of each of the several States is charged with the enforcement of and requiring compliances with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same way and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be.

For the purposes set out in this section, the United States of America vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid: *Provided, however,* That by the passage of this section the United States of America in nowise relinquishes its jurisdiction for any purpose over the property named, with the exception of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated: *Provided further,* That nothing in this section shall be

construed to modify or amend the United States Employees' Compensation Act, as amended.

June 25, 1936, c. 822, §§ 1, 2, 49 Stat. 1938, 1939.

§ 1061. Principal contractors; liability

Where any person (in this Section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this Section referred to as contractor, for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him; and where compensation is claimed from, or proceedings are taken against, the principal, then, in the application of this Chapter reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the employee under the employer by whom he is immediately employed.

Where the principal is liable to pay compensation under this Section, he shall be entitled to indemnity from any person who independently of this Section would have been liable to pay compensation to the employee or his dependent, and shall have a cause of action therefor.

§ 1101. Employee and employer suits against third persons causing injury; effect on right to compensation

When an injury for which compensation is payable under this Chapter has been sustained under circumstances creating in some person (in this Section referred to as third person) other than the employer a legal liability to pay damages in respect thereto, the injured employee or his dependent may claim compensation under this Chapter and the payment or award of compensation hereunder shall not affect the claim or right of action of the injured employee or his dependent against such third person, nor be regarded as establishing a measure of damages for the injury; and such injured employee or his dependent may obtain damages from or proceed at law against such third person to recover damages for the injury.

Any employer having paid or having become obligated to pay compensation under the provisions of this Chapter may bring suit against such third person to recover any amount which he has paid or become obligated to pay as compensation to any injured employee or his dependent.

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